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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 391

E. E. ASHCRAFT AND JOHN WARE,
Petitioners,

vs.

STATE OF TENNESSEE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

JAMES F. BICKERS,
GROVER N. McCORMICK,
Counsel for Petitioners.

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PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

To the Honorables, Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner John Ware was indicted by the Grand Jury of Shelby County, Tennessee, wherein he was charged with the murder of one Zelma Ida Ashcraft in Shelby County, Tennessee.

Petitioner E. E. Ashcraft was indicted by the same Grand Jury jointly with John Ware and was charged as being an accessory before the fact of the said murder.

They were tried by a jury in Division I of the Criminal Court of Shelby County, Tennessee, and convicted and sentenced by the jury to ninety-nine years each in the Tennessee State Penitentiary.

Appeal was perfected to the Supreme Court of Tennessee and on July 3 in an opinion rendered by Justice Allan M. Prewitt, the Court affirmed the case, Justice A. D. Neal dissenting, but filing no written opinion.

Certified copy of the opinion of the Supreme Court of Tennessee is attached hereto, made a part of this petition and is marked Exhibit "A".* We are also attaching to this petition a copy of the assignment of errors, brief and argument in support thereof filed in their behalf in the Supreme Court of Tennessee, making same Exhibits "B" and "C".**

Your petitioners are filing this petition in this Honorable Court asking for a review of this case to the end that their rights may be properly protected and adjudicated.

We are presenting to the Court with this petition, by and with the consent and agreement of the Attorney General of the State of Tennessee, all parts of the record filed in the Supreme Court of Tennessee which has any bearing upon the issues presented to this Court for consideration.

Statement of the Case.

We shall, if the Court please, make this statement of the case as concise and brief as we possibly can in accordance with the rules of this Court, but we do want to get before the Court a full and complete picture of this entire matter because it is felt that the rights of these defendants have been, as we think, beyond question violated and relief by this Honorable Court granted to them.

On the morning of June 5, 1941, Mrs. Ashcraft, as was her custom from time to time, started on her way to visit her mother in Kentucky. She had made her preparations to make this trip for several days. She was making the

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* Printed in the record at page 346.

** Not printed.

trip alone as she had done many times before in this same manner. She left the Ashcraft home between three and three-thirty o'clock in the early morning of June 5.

She and Mr. Ashcraft on this morning arose and Mr. Ashcraft prepared some coffee for his wife which she drank together with a glass of fruit juice. The car was in the driveway and Mr. Ashcraft placed her bags into the car and she backed out of the driveway and waved good-bye to her husband and he waved back and she was on her way.

On the late afternoon of June 5, Mrs. Ashcraft's body was found in a slough just off of what is known as the Raleigh Road, a few miles from the city limits of the City of Memphis, and a mile or so south of the small town of Raleigh. She was dead. The car which she was driving was found facing north on the left hand side of the road, that is, the wrong side of the road.

The body of Mrs. Ashcraft was fished out of the slough and it was found she had two or three cut places on her head. The doctor testified that these blows on the head producing the cut places was sufficient to produce death. There was no blood found on her head, in her hair, on her person, on her clothes or any other place. There was no blood found anywhere about the automobile or any other place. It was shown that Mrs. Ashcraft met her death around 3:30 o'clock on this morning of June 5, 1941, or shortly thereafter. It was certainly around this time.

At the time Mr. Ashcraft was in the employ of the E. O. Korsmo Construction Company, which company was under a Government contract doing a large job of work on a project on Wolf River in North Memphis. Mr. Ashcraft is a highly skilled mechanic and operator of steam shovels, draglines and types of work of this kind, and is admittedly one of the ablest and most dependable men in his line of work among the contractors generally. He was held in the

highest esteem by his employers as this record beyond question reflects.

Mr. Ashcraft was a home loving man, treated his wife like a baby, gave her his pay check and she handled the business of the family. At the time of this tragedy they had a joint bank account in the savings department of the Union Planters Bank in which was deposited more than $3600.00. They had a joint checking account in the same bank in which there was a little more than $600.00. They both saved their money and were purchasing the home in which they lived and held title to this property jointly.

This couple had a large number of friends. On the very night before the death of Mrs. Ashcraft, that is to say, the evening of the 4th of June, at about 4:45 or 5 o'clock, four of their friends visited in the home of Mr. and Mrs. Ashcraft, who were, Miss Minich, Miss Hightower, a Mrs. Rollin Gibson and a Miss Rice, all nurses or student nurses at the Methodist Hospital in the city of Memphis.

Mr. Ashcraft came in from his work about 7 o'clock, dinner was prepared, a highball taken by several of them and a pleasant evening had by all. Around nine or nine-thirty in the evening Mr. and Mrs. Ashcraft drove these ladies to the Methodist Hospital where they were required to be on duty at ten o'clock.

Mr. and Mrs. Ashcraft according to these witnesses were in a most happy frame of mind. After leaving these ladies at the hospital Mr. and Mrs. Ashcraft drove back to their home in North Memphis, set the alarm clock for three the next morning and went to bed.

After Mrs. Ashcraft left the home on the morning of June 5, as aforesaid, Mr. Ashcraft lay across the bed for a little while, got up and reported for duty on his job and handled his steam shovel as usual all of the day. He got off from his work in the late afternoon and about six o'clock as he was nearing his home he was notified by police

officers who were near his home at the time, that his wife's body had been found out near Raleigh and that they had found her driver's license near the car, and it was in this manner that Mr. Ashcraft was contacted by the officers.

The officers talked to Mr. Ashcaft in his home for a little while in an effort to gain some clue as to who had perpetrated this crime. He was then taken to the undertaking establishment and identified the body as that of his wife, and was then taken to the County Jail where he was questioned until about two o'clock in the morning, that is to say, from around eight or nine until two the following morning when he was taken home.

He told the officers very frankly that he had no idea who could have perpetrated this crime because he knew of no enemies that his wife had. Mrs. Ashcraft had considerable money on her person when she left for her trip and none was found at the scene of the tragedy. Her purse was opened and some of the contents thereof found by the side of the automobile.

Mrs. Ashcraft was a frail nervous lady, had trouble in sleeping and took amytal tablets at times and took other medicine for headache. Mr. Ashcraft told the officers upon his first questioning that on the way to the hospital with their friends on this night of June 4, that Mrs. Ashcraft and one of the friends went into Halls Drug Store on the way and purchased some amytal tablets as had been her custom, and that he thought she had taken one of the tablets before she went to bed, and that he thought she took one of the tablets just before she started on her trip that morning. Mr. Ashcraft within the next week or ten days had one or more conferences with the officers investigating this case, they having told him not to leave the county, and in one of these conferences told Mr. Beckers, the Chief of the Homicide Bureau of the Sheriff's office, that if he had left the impression upon him that Mrs. Ashcraft had taken amytal

on the morning before she left on the trip he was mistaken in this regard, and that he was pretty certain that she did not so do.

In his first interview with the officers Mr. Ashcraft was asked about the condition of his car. He told the officers that the car was in good shape and that the only trouble he had had with it was that the anti-freeze in the radiator had caused a hole in the rubber hose connection at the top of the radiator, and that upon one or more occasions water had dripped down on the spark plugs and some trouble arose in starting the car.

In one of his early interviews with Mr. Becker, Chief Homicide Officer, Mr. Ashcraft had told him that he did not know how his wife's watch got into the dresser drawer where it was found by the officers in the home.

On the afternoon of Saturday, June 14, 1941, at about seven o'clock, the officers came out to Mr. Ashcraft's home and took him into custody. They took him to an office or room on the northwest corner of the 5th floor of the Shelby County Jail. This office is equipped with all sorts of crime and detecting devices such as a fingerprint outfit, cameras, high powered lights and such other devices as might be found in a homicide investigating office.

The officers, according to this record, wanted an additional explanation from Mr. Ashcraft with reference to his wife taking an amytal tablet on the morning before she left on her trip, the condition of the hole in the rubber hose on his car and the findings of the watch in the dresser drawer.

According to all the proof in the case it is uncontradicted that they placed Mr. Ashcraft at a table in this room on the 5th floor of the County Jail with high powered lights in his face and began to quizz him. They quizzed him in relays until the following Monday morning, June 16, 1941, around 9:30 or 10 o'clock. It is admitted that the defendant Ashcraft from Saturday evening at seven o'clock until Monday

morning at approximately 9:30 o'clock never left this Homicide room on the 5th floor of the Shelby County Jail. He was never out of the presence at any time of the officers having him in custody and he was quizzed as aforesaid in relays.

There was present during this quizzing and propounding of questions to him, First Assistant Attorney General Preston Battle; Mr. Becker, Chief of the Homicide Bureau; Mr. Robert Ezzell, the Attorney General's private detective, and Deputy Sheriffs Key and Jaroe. Mr. Key is the State's Assistant in the Homicide Bureau.

Mr. Becker stated that at about 11 o'clock Saturday night he charged Mr. Asheraft with the murder of his wife. At about eleven o'clock Sunday night, June 15th, according to the state's proof in the record Mr. Asheraft broke and stated that a negro had killed his wife. Immediately he was accused by the officers having hired a negro to kill his wife. About this time the officers had asked Mr. Asheraft if at any time during his work he had ever carried any one home or ridden any one. In response Asheraft told them he had ridden upon one or more occasions a negro by the name of John Ware and a white man by the name of Tackett. He was asked by the officers if he knew where Tackett and John Ware lived. He told the officers that Tackett was in Mississippi or Louisiana on a Government job and he thought he knew the street on which John Ware lived, but he did not know the house.

He was taken by the officers at around twelve or one o'clock Monday morning to the street on which Ware lived. The officers went in one house and it proved to be a place where Ware did not live. They went next door and found him and placed him in custody.

The record shows that about seven o'clock Monday morning or shortly before, the officers secured a confession from John Ware implicating Mr. Asheraft in this murder.

Later on, that is to say, about 9:30 in the morning a paper writing was presented to Mr. Ashcraft for his signature purporting to be his confession of the murder of his wife. He refused to sign it.

Shortly before 8:30 o'clock on Monday morning, June 16, one Hugh Mageveny, a Justice of Peace in Shelby County, Tennessee, was called by the Sheriff from his home to come to the County Jail. At 8:30 in the morning two warrants were issued upon the affidavit of Mr. George Becker, Chief of the Homicide Bureau of the Sheriff's Office of Shelby County, Tennessee, charging E. E. Ashcraft and John Ware with murdering Mrs. Zelma Ida Ashcraft. Witnesses on the warrant were Deputy Sheriffs Mateer, Key, Davis and Becker. They were summoned to appear at 8:30 A. M. to testify at the preliminary hearing of Ashcraft and Ware.

Ashcraft was arraigned first and no witnesses appeared or testified and no one was in the room but Mageveny and Ashcraft and this was in the same room on the 5th floor of the Shelby County Jail where Ashcraft had been all the time since Saturday evening at 7 o'clock. Mageveny read the warrant and asked Ashcraft to plead to it and Mr. Ashcraft pled "not guilty".

The record shows beyond contradiction that the committing Magistrate Magevney did not advise E. E. Ashcraft that he was entitled to be represented by counsel or that he told him that any statements he might make might be used against him in any trial that he might undergo in the Criminal Court of Shelby County, Tennessee. Justice Hugh Magevney had an office in downtown Memphis at 119 Madison, many blocks from the jail.

After his arraignment by the Justice of Peace, Assistant Attorney General Battle and other investigating officers continued their quizzing of the defendant Ashcraft and about 9:30 in the morning the paper writing above referred

to purporting to be his confession was presented to him for his signature and he refused to sign it. He was asking for counsel to advise him. This request was made of Becker and others and his requests were refused at all times.

At the same time there in the same manner the preliminary hearing of John Ware was had by Justice Magevney, no witnesses appearing or testifying, no instructions given him as to his constitutional right, that is, his right to counsel and the advice that any statements made might be used against him in any trial he might have, and a plea of not guilty entered for John Ware.

These defendants stand convicted solely and alone upon the alleged confessions and admissions said to have been made by them, which said alleged confessions and admissions were as we contend erroneously allowed to be considered by the jury convicting them. We feel that it would not be controverted by the State of Tennessee that if these alleged confessions and admissions by these defendants are illegal as evidence these convictions can not be possibly allowed to stand. There is utterly no other evidence in the record to sustain the convictions.

Specification of Errors.

1. THE ALLEGED CONFESSIONS, ORAL OR WRITTEN ALLEGED TO HAVE BEEN MADE BY DEFENDANT ASHCRAFT AND WARE ARE ILLEGAL AS EVIDENCE BECAUSE THEY WERE NOT FREELY AND VOLUNTARILY SECURED OR GIVEN, AND THEIR CONSTITUTIONAL RIGHTS BOTH UNDER THE CONSTITUTION OF THE STATE OF TENNESSEE AND THE CONSTITUTION OF THE UNITED STATES, PARTICULARLY THE "DUE PROCESS" CLAUSE OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES WERE RUTHLESSLY OVERRIDDEN AND VIOLATED BY THE CONSTITUTED AUTHORITIES OF THE STATE OF TENNESSEE AND SHELBY COUNTY IN SECURING SAME.

2. ALLEGED CONFESSIONS AND ADMISSIONS EITHER ORAL OR WRITTEN ALLEGED TO HAVE BEEN MADE BY DEFENDENTS ASH-

CRAFT AND WARE IN THIS CASE SECURED AND EXTORTED IN THIS CASE AND BY THE MEANS USED ARE ILLEGAL FOR ALL PURPOSES AND ARE INADMISSIBLE AS EVIDENCE AGAINST THEM.

Supporting authorities:

Polk v. *State of Tennessee*, 170 Tenn. 271;
Cross v. *State of Tennessee*, 140 Tenn. 510;
Code State of Tennessee (1932), Sections 11,547, 11,548, 11,549, 11,554 and 11,555;
Brahm v. *United States*, 42 L. Ed. 568, 169 U. S. 532;
Ziang Sung Wan v. *United States*, 266 U. S. 1, 69 L. Ed. 131;
Chambers v. *Florida*, 309 U. S. 227, 84 L. Ed. 419;
White v. *State of Texas*, 310 U. S. 530;
Lomax v. *State of Texas*, 313 U. S. 544;
Vernon v. *State of Alabama*, 313 U. S. 547;
Canty v. *Alabama*, 309 U. S. 628;
Benjamin McNabb et al. v. *United States*, 87 U. S. L. Ed. 579;
Mitchell Clifton Anderson v. *United States*, 87 U. S. L. Ed. 589.

We shall discuss the above set out two specification of errors jointly.

Argument.

We submit that the record in this case plainly and obviously shows that any statements or alleged confessions as made by E. E. Ashcraft and John Ware testified to by the witnesses were made under duress and under circumstances that clearly shows they were not freely and voluntarily made, and that the action of the witness Becker and other and the Attorney General, in his representation and treatment of them, the defendants, was in violation of their rights under the Constitution of Tennessee and also the Constitution of the United States as aforesaid.

We have already stated that the record shows without contradiction that the defendant Ashcraft remained in this

room on the 5th floor of the Shelby County Jail from 7 o'clock Saturday evening, June 14, 1941, until Monday morning, June 16, 1941, without the aid of counsel, without being permitted to communicate with friends, alone and helpless, not allowed to have any rest or sleep, and according to his testimony not allowed to respond to the laws of nature, and was under the constant cross examination in relays of the officers of Shelby County, Tennessee, the Attorney General's office and the First Assistant Attorney General of Shelby County, Tennesee, Mr. Preston Battle. This we assert can not be countenanced or approved by any appellate court.

Witness Becker testified in this record that after he and the Assistant Attorney General Battle in this room on the 5th floor of the County Jail questioned the defendant Ashcraft for several hours, became exhausted physically and retired for rest and sleep.

Thereupon two other officers took over the quizzing of Ashcraft and they became exhausted and retired for rest and sleep. Then other officers took over. However exhausted and tired the officer became by reason of their quizzing Ashcraft admittedly was never allowed any rest or sleep for more than thirty-six hours or until the alleged confession was made. If the officers quizzing him became so exhausted as to require rest from fatigue and exhaustion, it is reasonable to assume that the defendant Ashcraft became and was physically exhausted.

It is admitted by all witnesses that he was never allowed to sleep or rest or to get out of this room on the 5th floor of the County Jail of Shelby County, Tennessee.

The defendant Ashcraft was brought in for examination and investigation, according to the State's proof, upon the flimsy pretext that they wanted to examine him further on the question of whether or not his wife took amytal before

she left on her trip and for an explanation of the leak in the rubber water hose connected with the radiator of his automobile. According to the State's witnesses he was not under arrest, he was not charged with any crime and was held incommunicado as aforesaid illegally without any warrant for thirty-six hours.

It is significant that the Attorney General's office and the Sheriff's office took this defendant in custody on Saturday evening at 7 o'clock when all the Judges in Shelby County had closed their courts and were on their week end vacations and rest, and when no fear on their part could be entertained reasonably that a writ of habeas corpus would be sued out. He was taken in custody in his home where he was alone and no friend of his or any other person so far as the record shows knew or had opportunity to know of his whereabouts.

Chief Homicide Officer Becker testified frankly that he was going to keep defendant Ashcraft in custody in the room on the 5th floor of Shelby County, Tennessee, until he made a "satisfactory" explanation to him. Here is what he had to say:

> "Q. If you hadn't gotten an explanation about those three inconsequential matters in 16 hours, how much longer do you think you would have kept him to get that explanation?
>
> A. I don't know. That's something that didn't come up.
>
> Q. What didn't come up?
>
> A. About how long I would have stayed there; but I'll tell you this: that if he hadn't admitted it, he would still have been charged with murder on those three inconsequential matters as you call them.
>
> Q. You mean now to tell this jury that if he hadn't later said what you say he said there would have been a charge of murder placed against him?
>
> A. I do." (R. 96.)

What is more, Assistant Attorney General Battle, who was as aforesaid in on this cross-examination of Ashcraft from the beginning, admitted that as a part of his cross-examination and interrogation; which we interpolate here to say, is the longest cross-examination of any one witness that it has been our experience to observe, and particularly when he did not allow his witness to have any sleep or give him any quarter or consideration; he read to him from the Bible about nine or ten o'clock Sunday night before Ashcraft had shown, according to State's testimony, any signs of yielding. What portion of the Holy Scriptures Mr. Battle read to him he was not able to say, except the Commandment "Thou Shalt Not Kill," nor was he able to give any reasonable purpose for his Biblical exposition.

Seriously, may it please the Court, it is perfectly obvious from the reading of Becker's testimony and General Battle's testimony that they were both determined to wring an admission of guilt from this defendant Ashcraft by any means, foul or fair.

This same Sunday night about eleven o'clock, according to the testimony of Becker and Battle, defendant Ashcraft was asked if he had ridden any person in his automobile to or from his work. It was then that Mr. Ashcraft related that he had upon one or two occasions driven home or to work a white man by the name of Tackett and a negro boy by the name of John Ware. It was then that the defendant John Ware came into the picture. The officers about 1:30 Sunday morning went out and took into custody John Ware, this twenty year old negro boy and literally scared him to death, and then started in on the cross-examination of Ware.

It is extremely significant here to call the attention of the court to the fact that Attorney General Gerber called Henry Waldauer, a court reporter, at his home at about two o'clock Monday morning, June 16, and told Mr. Wal-

dauer in that telephone conversation that the defendant Ashcraft was "about to make a confession." We quote the following testimony on the cross-examination of Mr. Waldauer:

> "Q. In other words, you don't undertake to say to this jury where Ashcraft was or what was happening to him from the time you got there at 2:00 o'clock Monday morning until you first saw him at 6:00 o'clock up in that room?
>
> A. No, sir, I do not.
>
> Q. You don't know a thing about that?
>
> A. Not a thing.
>
> Q. I think at 2 o'clock General Gerber told you over the phone he was about to make a confession and he wanted you to take it down?
>
> A. Right." (R. 148.)

It is submitted that under the law in Tennessee, as well as in other jurisdictions, that it was the duty of the officer before they took this defendant Ashcraft into custody to have sworn out a warrant for his arrest charging him with the murder of his wife if they wanted to take him into custody at all. They admittedly did not do this. They simply took him out of circulation and held him illegally.

Be this as it may however, there can be no doubt in the minds of any lawyer or Court that at eleven o'clock Saturday night, June 14, 1941, when Becker and General Battle in the room in the county jail charged the defendant Ashcraft with having murdered his wife, it was their duty at that time to swear out a warrant so charging and promptly take him to a committing magistrate for a preliminary hearing. This they did not do and violated in not so doing his statutory and constitutional rights. The provisions of our code and the decisions of this Honorable Court on this subject are too well known to set them out and to discuss them here. It is only necessary to call this to the attention of the Court.

In the opinion of this Honorable Court in the McNabb case, Mr. Justice Frankfurter referred specifically to the section of our Code (Section 11555) and also referred to the case of Polk vs. State of Tennessee with approval and supporting authorities.

We charge that the swearing out of the warrant and the preliminary hearing, if it can be dignified as such, was a farce. We have already stated what occurred. The record shows beyond contradiction that this defendant by the committing Magistrate was not at any time asked if he desired to waive the examination of witnesses or a formal hearing. He was not asked by the committing magistrate if he desired the aid of, counsel. He was not asked or informed that any statement he might make would be used against him in court at his trial.

All this took place in the room on the 5th floor of the county jail with no one present but the committing Magistrate and Ashcraft. The committing Magistrate had an office as aforesaid at 119 Madison where he held his court and the arraignment or preliminary hearing could have been held there with dignity and decorum. All of this occurred approximately 30 hours after this defendant Ashcraft had been openly and admittedly by the officers and General Battle charged with the murder of his wife.

We call the attention of the court to the case of

Cross v. *State*, 142 Tenn. 510.

In this case Mr. Justice McKinney in the opinion very ably set forth just what is required under our law in such cases. The provisions of the Code designated in the Cross case are carried in our 1932 Code under the sections set out above.

Mr. Justice McKinney in this case discusses very abely the question of the legality of confessions generally. In this connection we desire to call the attention of the court to the case of

Polk v. *State*—170 Tenn. 271.

We deem it unnecessary to quote from this case, but the court will readily see it is applicable upon reading it.

We have already asserted that the admissions or the so called confessions of the defendants Ashcraft and Ware were illegal and not admissable as evidence, but for the sake of argument we should admit that if they were or if the Court should so find that they were, it was error for the trial court over the objection and exception of counsel for the defendants Ashcraft and Ware to allow witness Becker and others to testify to all of the so called oral admissions of the defendants and then to bolster this testimony up by admitting a long typewritten so-called statement made by the defendants. This was error and highly prejudicial to the rights of these defendants.

This Honorable Court years ago discussed the legality of confessions of the character under discussion. The first outstanding case is that of

Brahm v. *U. S.*, 169 US 532, 42 L. Ed. 568.

Then followed the very noted case of,

Ziang Sung Wan v. *U. S.* 266 US 1, 69 L. Ed. 131.

While these cases are full and complete on the subject this Honorable Court has gone much further and has very definitely placed its stamp of disapproval upon confessions secured as this one is alleged to have been extorted.

We cite the Court to the case of
Chambers et al v. *Florida* 309 US 227.

We deem it only necessary to cite this case to the Court without quoting from it at all, but we will make the observation that the defendants or the petitioners in the United States Supreme Court suffered no physical violence at the hands of the officers. They were only questioned for a

long period of time on the 4th floor of the jail in the presence of the Attorney General.

It will be observed that this Honorable Court branded the activities of the Attorney General in this case as reprehensible. His place was said to be at the Bar in the presence of the Criminal Court Judge as Prosecuting Attorney and not an extortioner of evidence.

The Court will observe that the next case was,

White v. *State of Texas* 310 US 530.

In this case the defendant White was convicted of rape and sentenced to death. The Supreme Court of the State of Texas affirmed the lower court. A petition for certiorari was filed in his behalf in the Supreme Court of the United States and it was first denied. A petition to rehear was then filed in his behalf and the authorities of the State of Texas evidently paid little attention to the petition to rehear. The petition to rehear was granted by this Honorable Court. It was then that the authorities of the State of Texas filed a petition to rehear and it is upon this petition the opinion of this Honorable Court is based.

We cite to the Court the case of,

Lomax v. *State of Texas* 313 US 544, 144 SW 555.

The opinion is a per curium.

Then follows the case of,

Vernon v. *State of Alabama* 315 US 547, 200, So. 560.

We cite the Court to the case of,

Canty v. *Alabama* 309 US 628, 191 So 260.

The very latest opinion on this subject is the case of,

Benjamin McNabb et al v. *US of A.*

We do not deem it necessary to quote from the opinion of this Honorable Court in this very recent case with which

this Honorable Court is of course familiar, but it is decisive as we see it of the issues under consideration here.

The opinion of this Honorable Court in the McNabb case simply confirms the opinion of our own Court which was not followed by the Supreme Court of Tennessee in the instant case in the Polk case and in the Cross case.

There is no place in American jurisprudence or in a democratic society for the use of extorted confessions to convict persons charged with crime. The sweat box, the thumbscrew and the wooden boot to extort confessions from persons charged with crime have been long since outmoded.

Perfectly aware of the fact that the prosecuting officers and those in authority in the various states have gone far afield and beyond their constitutional prerogatives in securing confessions of persons charged with crime not only this Honorable Court has been called upon but did condemn the practice by its opinions, but the American Bar Association in a formal meeting assembled has done so.

The American Bar Association has condemned the practice of extorting confessions from persons in custody and passed a very strong resolution at its 56th Annual Meeting as is found on page 149 of the bound volumes of the report of the proceedings. We quote from this resolution as follows:

> "(5) That lawless methods of law enforcement have a great tendency to promote crime, (6) That the extortion of confessions or admissions by depriving the prisoner of opportunity of sleep, depriving him of food or drink, or any of the so-called methods of third decree is abhorent to all who value the dearly purchased liberties declared in our Constitution and is indefensible upon any grounds. (7) That all law enforcement officers and judges ought to be alert to protect arrested persons in their constitutional rights and ought never to take part in or to countenance any attempt by secret inquisitions or other lawless means to get confessions or admissions."

We therefore have the American Bar Association and the Supreme Court of the State of Tennessee condemning this outrageous practice, and this Honorable Court in late and powerful opinions condemning such practices and saying in so many words that all courts and law officers so doing must be stopped and stamped out once and for all.

The facts of this case under consideration present this nefarious and illegal practice in its ugliest and most reprehensible form. It simply is not right to take any person or citizen suspected of crime into custody and mistreat him or hold him without warrant until he confesses. This case presents this reprehensible, illegal and oppressive practice in its most repugnant form. This is the crowning case. It presents the extremest limit to which this practice can be carried. We ask this Court to stamp it out and stop it now. It must be stopped in this democratic county.

We feel that under the authorities that we have cited the Court will with promptitude reverse this case.

Specification of Error No. 3.

THE COURT ERRED IN THIS CASE IN DELIVERING HIS CHARGE TO THE JURY IN THAT HE IN NO PLACE OR AT ANY TIME IN HIS CHARGE TO THE JURY PRESENTED THE THEORY OF THE DEFENDANT ASHCRAFT TO THE JURY. HE WHOLLY AND COMPLETELY IN HIS CHARGE IGNORED THE CONTENTION AND THEORY OF THE DEFENDANT ASHCRAFT THAT THE ALLEGED CONFESSION OR ADMISSIONS MADE BY HIM EITHER IN WRITING OR ORALLY MADE WERE MADE BY HIM THROUGH DURESS, FORCE AND THREATENED VIOLENCE, AND WERE NOT FREELY AND VOLUNTARILY MADE AND WHOLLY INCOMPETENT AS EVIDENCE AGAINST HIM IN THE CASE, OR THAT IF THE JURY FOUND THAT SAID STATEMENTS WERE NOT FREELY AND VOLUNTARILY MADE THE JURY COULD NOT CONSIDER THEM FOR ANY PURPOSE AGAINST HIM. HE SUBMITS THAT THE COURT THEREFORE WHOLLY

FAILED TO SUBMIT THE THEORY OF THIS DEFENDANT TO THE JURY AT ALL AND THAT THIS WAS AN ERROR.

May it please the Court: We submit that the defendant Ashcraft in this case has in reality never had a legal trial; that the proceedings had in the Criminal Court of Shelby County, Tennessee wherein he was convicted and sentenced to ninety-nine years in the Tennessee State Penitentiary were a legal nullity.

As aforesaid, both he and the defendant Ware stand convicted solely and alone upon their alleged confessions. The validity of their said confessions and admissions was the sole issue in the case. The case was tried out on that issue. The defendants contended that the so-called confessions and admissions were illegal as evidence and incompetent against them because they were not freely and voluntarily made and that they were taken in violation of their Constitutional rights—particularly the Due Process Clause of the 14th Amendment of the Constitution of the United States.

For the following reason it is submitted that the defendant Ashcraft has had actually no trial of his case:

When objection to the introduction of his so-called confession and admission was made in his behalf the trial court in overruling his objection had the following to say with respect to the same:

> "• • • In view of the testimony of the witnesses in this case, including Mr. Waldauer, including the various sheriff's officers who have testified, and of Mr. Ashcraft himself, this Court is not able to hold, as a matter of law, that reasonable minds might not differ on the question of whether or not that alleged confession was voluntarily obtained. And, therefore, as to the defendant Ashcraft, the motion will be overruled."
>
> "• • • The Court is not able, as a matter of law, to say that the reasonable minds of twelve men might not differ as to the question of whether Ware's confes-

sion was voluntary, and thinks, therefore, that is a question of fact for the jury to pass on."

This Honorable Court will see that the trial court said that he could not say that the alleged confessions and admissions were not freely and voluntarily made and that the minds of reasonable men might differ on this issue. Yet when he came to charge the jury the trial court refused to submit to the jury trying the case the question as to whether or not the confessions were as a fact freely and voluntarily made. He had the following to say in his charge:

> "It is the theory of the defendant Ashcraft, that he did not counsel, hire, incite, command or procure the defendant Ware to kill the deceased Zelma Ida Ashcraft and that he had nothing whatsoever to do with her death, and that he is not guilty of the offense charged against him in the indictment and that the State of Tennessee has failed to prove his guilt beyond a reasonable doubt. If you believe the theory of the defendant, Ashcraft, or if you believe the theory of the defendant Ware, or if upon all the proof, you have a reasonable doubt of the guilt of either of the defendants, it is your duty to acquit the defendant, Ashcraft."

This is all that he did say in his charge to the jury with respect to the theory of the defendant Ashcraft.

The trial court therefore, as we assert, has for all practical intents and purposes preemptorily instructed the jury to find the defendant Ashcraft guilty. This is what in effect his charge amounted to. The action of the trial court was duly excepted to and was assigned as an error in the Supreme Court of Tennessee in this case. It is submitted that therefore Ashcraft has had in effect no trial of his case. The jury under the charge of the court was left no discretion and was virtually told to accept the alleged confessions and admissions by Ashcraft as true. The jury

was not allowed to pass upon the question as to whether or not they were freely and voluntarily made..

It is submitted that the constitutional rights under the Constitution of the United States were invaded and set aside and for naught held by the trial court and that actually the defendant Ashcraft has had no trial of the real issues joined in his case.

The Supreme Court of Tennessee erred in not sustaining the assignments of error filed by and in behalf of both Ashcraft and Ware. A simple reading of the opinion of Mr. Justice Prewitt of the Supreme Court of Tennessee will show that he did not pass upon the issues and the assignments of error made by and in behalf of these defendants.

This Honorable Court touched upon and decided this very question in the case of *White* v. *State of Texas.*

This record reflects that the defendant Ashcraft from a mental standpoint, although he was an expert mechanic with his hands, is as ignorant a man as this twenty-year-old-negro boy, John Ware. However this may be, we submit that mentality is not a proper legal test of whether the constitutional rights of a person charged with crime have been invaded and disregarded. The constitutional rights of a mental genius can be just as ruthlessly disregarded and invaded as the constitutional rights of the most ignorant person.

Mr. Justice Frankfurter in his opinion in the case of *Anderson* v. *United States* says that the government conceded that the officers of the State of Tennessee violated the laws of the State of Tennessee and the Statute of the State of Tennessee in their treatment of the defendant in that case.

The action of the Tennessee officers in their treatment of the defendants before this Honorable Court in the *Anderson* case was far less reprehensible than the treatment

by the officers and Assistant Attorney General of these defendants in this case.

Your petitioner therefore respectfully pray that this their petition for writ of certiorari be issued and granted to the Supreme Court of the State of Tennessee to bring this cause before this Honorable Court and the record in the cause so that this Honorable Court might consider the issues raised in said petition and errors assigned, and that upon consideration by this Honorable Court their case reversed and their constitutional rights preserved.

This is the first application for writ of certiorari in these cases.

Respectfully submitted,

GROVER MCCORMICK,
JAMES F. BICKERS,
Attorneys for Petitioners.

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